



April 28, 2017

Via USACE-EO11988@usace.army.mil [State "Implementation Comments" in subject line of email when submitting]

HQ, U.S. Army Corps of Engineers
ATTN: EO13690/CECW-HS/3G68
551 G Street NW
Washington, DC 20314-1000

Re: Comments on Implementation of Executive Orders ("EOs") on Floodplain Management and Establishing a Federal Flood Risk Management Standard ("FFRMS") and a Process for Further Soliciting and Considering Stakeholder Input including Draft Engineering Circular ("Draft EC") 1165-2-217

Dear Dr. Bray,

The American Petroleum Institute ("API"), the Independent Petroleum Association of America ("IPAA"), the American Exploration & Production Council ("AXPC"), the U.S. Oil and Gas Association ("USOGA"), the Louisiana Oil and Gas Association ("LOGA"), and the Louisiana Mid-Continent Oil and Gas Association ("LMOGA") (collectively "the Associations") are pleased to submit comments on the U.S. Army Corps of Engineers' ("Corps") notice as published in the Federal Register and associated Draft EC on December 16, 2016 with comments due by January 30, 2017 and then as extended to May 1, 2017.¹

The Associations share the Corps' goals for constructing, maintaining and operating projects to improve resilience to current and future flood risks in keeping with flood management requirements as promulgated by EO 11988. However, the Associations have significant overall concerns with the Corps' implementation of EO 13690 and the FFRMS in this guidance – even while recognizing that the Draft EC does not apply to the Corps' Regulatory Program executed under Section 404 of the Clean Water Act ("CWA"), Sections 9 and 10 of the Rivers and

¹ 81 Fed. Reg. 91,150 (Dec. 16, 2016) ("Federal Notice") and Draft EC 1165-2-217.

<http://www.iwr.usace.army.mil/Missions/Flood-Risk-Management/Flood-Risk-Management-Program/About-the-Program/Policy-and-Guidance/Federal-Flood-Risk-Management-Standard/> [Last accessed Apr. 25, 2017; Note: Draft EC was not available on Corps Site at this time]. This Draft EC would rescind Environmental Regulation ("ER") 1165-2-26 (Mar. 30, 1984).

Harbors Appropriation Act of 1899 (“Rivers and Harbors Act of 1899”), and Section 103 of the Marine Protection, Research, and Sanctuaries Act (“Ocean Dumping Act”).²

Much has also changed since the Draft EC was issued in December, 2016. On March 28, 2017, President Trump issued policy directives recognizing unnecessary regulatory burdens of agency actions on energy production, economic growth, and job creation, as well as rescinding certain climate-related presidential and regulatory actions.³ Based on specific instructions given to agency heads and as discussed below, the Associations believe that the Draft EC should be withdrawn and/or revised as necessary.

The API is a national trade association representing over 600-member companies involved in all aspects of the oil and natural gas industry. The API’s members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. The API members have a substantial interest in federal water and related land resources planning, regulating, and licensing activities which are in the general scope of this Federal Notice and Draft EC as discussed below.

The IPAA represents the thousands of independent oil and natural gas explorers and producers, as well as the service and supply industries that support their efforts, that will most directly be impacted by the federal regulatory policies. Independent producers develop about 95 percent of American oil and natural gas wells, produce 54 percent of American oil, and produce 85 percent of American natural gas. Historically, independent producers have invested over 150 percent of their cash flow back into American oil and natural gas development to find and produce more American energy. The IPAA is dedicated to ensuring a strong, viable American oil and natural gas industry, recognizing that an adequate and secure supply of energy is essential to the national economy.

The AXPC is a national trade association representing 33 of America’s largest and most active independent natural gas and crude oil exploration and production companies. The AXPC’s members are “independent” in that their operations are limited to the exploration for and production of natural gas and crude oil. Moreover, its members operate autonomously, unlike their fully integrated counterparts, which operate in different segments of the energy industry, such as refining and marketing. The AXPC’s members are leaders in developing and applying the innovative and advanced technologies necessary to explore for and produce natural gas and crude oil that allows our nation to add reasonably priced domestic energy reserves in environmentally responsible ways.

The USOGA (originally the Mid-Continent Oil & Gas Association) was founded in October 1917 in Tulsa, Oklahoma following the United States’ entry into World War I. A principal purpose of the USOGA’s foundation was to provide essential supplies of petroleum and

² 33 U.S.C § 1344; 33 U.S.C §§ 401, 403; and 33 U.S.C § 1413. Draft EC at p. 1. The Corps notes that the regulatory program is implemented through its regulations and cites to 33 CFR § 320.4(i). *Id.*

³ Presidential Executive Order on Promoting Energy Independence and Economic Growth (“EO on Energy Independence”), Mar. 28, 2017. <https://www.whitehouse.gov/the-press-office/2017/03/28/presidential-executive-order-promoting-energy-independence-and-economi-1> [Last accessed Apr. 25, 2017].

petroleum product to the allied forces, helping the Allies to “float[ed] to victory upon a wave of oil.”⁴ The USOGA’s contribution to that success helped establish it as an association in which individuals working cooperatively could resolve mutual problems and achieve great results. For more than nine decades, in good times and bad, the USOGA has been a strong advocate for the individuals who built and sustain the U.S. petroleum industry. The USOGA’s long history is one of distinguished service to the petroleum industry and to our country’s economic and strategic stability. It is recognized today as a proven and respected advocate for producers of domestic oil and gas.

The LOGA was organized in 1992 to represent the independent and service sectors of the oil and gas industry in Louisiana; this representation includes exploration, production and oilfield services. LOGA’s primary goal is to provide our industry with a working environment that will enhance the industry. LOGA provides services to its membership by creating incentives for Louisiana’s oil & gas industry, warding off tax increases, advocating for changes in existing burdensome regulations, and educating the public and government of the importance of the oil and gas industry in the state of Louisiana.

The LMOGA is an industry trade association representing companies that produce, transport, store, refine and market crude oil, natural gas and petroleum products in Louisiana and the Gulf of Mexico. Several of LMOGA’s member companies would be affected by any regulations promulgated as a result of this notice.

The Associations and their members have been constructive participants in the regulatory process relating to floodplain management. The API, the IPAA, the USOGA, and the Associated General Contractors of America submitted comments on the Final Revised Guidelines for Implementing EO 11988,⁵ Floodplain Management, Draft for Public Comment, as published on February 5, 2015.⁶ Separately, the IPAA and the AXPC also submitted comments on proposed Final Revised Guidelines.⁷ The API, the IPAA, and the AXPC also submitted comments on the Federal Emergency Management Agency’s (“FEMA”) Proposed Rule relating to updates to floodplain management and protection of wetlands regulations to implement EO 13690⁸ and the

⁴ Lord Curzon of Britain, Inter-Allied Petroleum Conference, Nov. 23, 1918.

⁵ 42 Fed. Reg. 26,951 (May 25, 1977) (“EO 11988”)

⁶ 80 Fed. Reg. 6,530 (Feb, 5, 2015); API et al. comments by Amy Emmert submitted to Mitigation Framework Leadership Group (“MitFLG”), May 5, 2015. See www.regulations.gov, Docket Id. FEMA-2015-0006. In response to comments, the Final Revised Guidelines narrow the applicability of these requirements to federally funded projects which the API appreciates; however, many of its concerns as outlined in its comment letter still remain and are incorporated by reference to this letter. See Guidelines for Implementing Executive Order 11988, Floodplain Management, and Executive Order 13690, Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input, Oct. 8, 2015 (“Final Revised Guidelines”).

⁷ Comments submitted by V. Bruce Thompson and Lee Fuller, Docket Id. FEMA-2015-0006.

⁸ 80 Fed. Reg. 6,425 (Feb. 4, 2015) (“EO 13690”).

FFRMS, FEMA policy relating to the implementation of the FFRMS, and associated documents available under Docket Id. No. FEMA 2015-0006.⁹

I. SUMMARY OF COMMENTS

Given the EO on Energy Independence, the Associations believe that the Draft EC should be withdrawn and any further revisions should be aligned with the policy directives of this EO. The EO on Energy Independence provides clear direction to agencies on taking steps to avoid “regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation.”¹⁰ The EO also rescinds certain energy and climate-related presidential and regulatory actions. And the EO calls for agency heads to identify actions that related or arose from these rescinded EOs, reports, and guidance and then “as soon as practicable” suspend, revise, or rescind those actions. The rescinded actions include the former President Obama’s Climate Change Plan which first mandated revisions to federal flood risk reduction standards for federally funded projects to account for impacts from climate change which led to the FFRMS. Thus, the Draft EC seeking to implement the Climate Informed Science Approach (“CISA”) from one of the four FFRM approaches is well within the purview of this EO.

While the EO on Energy Independence appears to settle any further discussion on the Draft EC, the Associations have chosen to provide comprehensive comments on the Draft EC especially since no explicit action to rescind EO 13690 or the FFRMS has been taken as of yet.

Overall, the Associations are troubled that the Corps has chosen to implement the EO 13690 and the FFRMS by selecting a different floodplain standard than the proposed FEMA and U.S. Department of Housing and Urban Development (“HUD”) rules for two main reasons. First, the Associations’ previous comments on floodplain issues reflect concern with the overall government policy of leaving floodplain definitions to the discretion of individual government agencies. Under this approach, the Associations submit that there is a greater likelihood for an assortment of floodplain definitions as each of the jurisdictional entities attempt to apply the new risk-based approaches (and by extension, to many state and local governments).¹¹ Varying use of floodplain standards is likely to lead to tremendous uncertainty, project delays, and increased

⁹ API et al. comments by Amy Emmert submitted to the FEMA’s Proposed Rule, October 21, 2016. See www.regulations.gov, Docket Ids. FEMA-2015-0006-0373, FEMA 2015-0006-0373; FEMA 2015-0006-0374, FEMA 2015-0006-0378. These comments are also incorporated by reference into this comment letter. FEMA’s Proposed Rule on Updates to Floodplain Management and Protection of Wetlands Regulations to Implement EO 13690 and FFRMS is published at 81 Fed. Reg. 57,502 (Aug. 22, 2016) (“FEMA’s Proposed Rule”). FEMA’s Guidance for implementing the FFRMS, FEMA Policy 07803 is published at 81 Fed. Reg. 56,558 (Aug. 22, 2016) (“Supplementary Policy”).

¹⁰ EO on Energy Interdependence at § 1(a).

¹¹ This comment letter references proposed notice and comment rules issued by the FEMA and the HUD. The Associations are also aware of the issuance of a handbook related to the U.S. Environmental Protection Agency’s (“EPA”) Water Infrastructure and Finance Innovation Act (“WIFIA”) program. See EPA’s WIFIA Program Handbook, 2017 (applying any one of the FFRMS approaches to new WIFIA-eligible projects or ones with substantial improvement or substantial damage).

costs to the regulated community, especially with projects that require multi-agency coordination, in terms of which floodplain approach and process would apply.

Second, in determining the floodplain for its federally funded projects, the Corps disregarded the Freeboard Value Approach (“FVA”) selected by both the proposed FEMA and HUD rules.¹² Instead, the Corps chose to adopt the far more problematic CISA, which has not been defined with sufficient clarity to provide an acceptable level of certainty for evaluating development projects from business, governmental, and other stakeholder perspectives. The Associations believe that the Corps has not fully considered the broad scope of the floodplain expansion contemplated under this Draft EC and its potential to have far-reaching implications. The Associations find that the Corps’ decision to choose the CISA as the primary FFRMS approach is unsupported by any additional data, technical support, or consideration to cost-benefit analyses associated with implementing this approach for applicable Corps civil works projects.

Without the benefit of additional data or justification from the Corps, the Associations urge the Corps to carefully review the EO on Energy Independence as well as both the FEMA’s and the HUD’s rationale for expressly rejecting the CISA. The FEMA found the CISA to be inadequate for floodplain designations given challenges with data and methodologies.¹³ Unsupported climate assumptions or speculation should not form the basis of an expanded floodplain definition. Along these lines, the Intergovernmental Panel on Climate Change (“IPCC”) separately finds that even with some improvements in regional scale climate information, there is substantial uncertainty in downscaling global projections of climate change effects postulated on the basis of complex global models (computer simulations) to regional scales or smaller.¹⁴ The IPCC also reports that in North America, “[f]ew discernible trends in flooding have been observed in the USA” and that “[c]hanges in the magnitude or frequency of flood events have not been attributed to climate change.”¹⁵ Citing to a number of studies, the IPCC finds that, “[f]loods are generated by multiple mechanisms (e.g., land use, seasonal changes, and urbanization); trend detection is confounded by flow regulation, teleconnections, and long-term persistence.”¹⁶

¹² See discussion below. Note the FEMA’s Proposed Rule chooses the FVA while it considers the use of CISA for limited critical if actionable science is available.

¹³ FEMA’s Proposed Rule at pp. 57,411-57,412.

¹⁴ See IPCC, 2014: Climate Change 2014: Impacts, Adaptations, and Vulnerability. Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Barros, Field, et. al (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, pp. 688, at pp. 1135-1138. The IPCC Report states, “Downscaling of global climate reconstructions and models has advanced to bring the climate data to a closer match for the temporal and spatial resolution requirements for assessing many regional impacts, and the application of downscaled climate data has expanded substantially since [IPCC’s Fourth Assessment Report]. This information remains weakly coordinated, and current results indicate that high-resolution downscaled reconstructions of the current climate can have significant errors. The increase in downscaled data sets has not narrowed the uncertainty range.” *Id.* at pp. 1137-1138. (Emphasis added.)

¹⁵ *Id.* at p. 1,456.

¹⁶ *Id.*

Without a standardized methodology for making CISA decisions, there is a real risk that an agency could interpret a handful of data-points of sea-level trending over the past several years as enough to extrapolate to a significantly larger floodplain or an agency could apply unevenly project-specific factors called for in the Final Revised Guidelines causing delay and uncertainty. Appendix H of the Final Revised Guidelines which the Corps references also states the limitations of actionable and available science especially in riverine conditions.¹⁷

In fact, there are formidable challenges associated with any of the FFRMS approaches and the Associations recommend that the Corps continue to maintain the traditional framework in all of its Corps projects, and remove all references to the FFRMS approaches in the Draft EC.¹⁸ The Associations also recommend that no additional policy and procedural documents or regulations should be updated to include these requirements. In addition, the Corps has not yet published any floodplain management revisions to its regulations and the Associations encourage that the Corps consistent with its existing policy, continues to review the Section 404 applications by applying the traditional framework of “the area subject to the ‘base flood’ as the relevant ‘floodplain’ as defined in E.O. 11988 and under 33 CFR 320.4.”¹⁹

The Associations submit that because of the limiting language in EO 13690 which states “to the extent permitted by law,” the Corps’ obligation to amend existing regulations and procedures under the order is not absolute.²⁰ Certain requirements that have the “practical effect” of imposing a standard could require an agency to conduct rule making and meet additional stricter legal requirements under statutes such as the Administrative Procedure Act (“APA”).²¹ Moreover, EO 11988 as amended does not create a mechanism for enforcing the terms of the order except that the Water Resources Council (“WRC”) is required to “periodically evaluate agency procedures and effectiveness.”²² Also, the FFRMS does not have the force of law and neither do the Revised Guidelines which are simply “advisory.”²³

Lastly, EO 13690’s amendment to EO 11988 encourages, “where possible,” natural or nature-based approaches in the development of alternatives for any federal action in the floodplain. The Corps limits the applicability of this provision to the Draft EC and does not initiate any rulemaking to include the Corps’ Regulatory Program. The Associations recommend that the

¹⁷ Final Revised Guidelines, Appendix H at pp. 14-16.

¹⁸ Note that the 1-percent annual chance floodplain for non-critical federal actions and 0.2 percent annual chance for floodplains for critical actions stemming from EO 11988 are referred to as the “traditional framework” in this document.

¹⁹ Applicability of Floodplain Management and FFRMS Executive Orders to USACE Permitting Authorities, Corps (“Corps Fact Sheet Relating to Section 404 Program”). <http://www.usace.army.mil/Media/Fact-Sheets/Fact-Sheet-Article-View/Article/613901/applicability-of-floodplain-management-and-ffrms-executive-orders-to-usace-perm>. [Last accessed Jan. 23. 2017].

²⁰ EO 13690.

²¹ See for example discussion relating to guidance in Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Circuit 2000) (striking down emissions monitoring guidance).

²² 42 Fed. Reg. 26,951 (May 25, 1977) (“EO 11988”).

²³ Final Revised Guidelines at p. 3.

Corps continue to consider natural and nature-based approaches on a case-by-case basis, and refrain from expanding this provision related to the development of alternatives to other steps in the 8-step floodplain decision making process.²⁴ The Corps states that additional guidance on the use of natural and nature-based approaches will be provided in the future and the Associations ask that any guidance continue to provide flexibility in the application of these approaches, allowing for the use of structure controls where appropriate, and taking into consideration the context, and pertinent factors such as the use of environment, cost, technology, and engineering.

In the Corps' implementation of EO 13690, the Draft EC states that the guidance is not applicable to the Regulatory Program executed under Section 404 of the CWA, Sections 9 and 10 of the Rivers and Harbors Act of 1899, and Section 103 of the Ocean Dumping Act.²⁵ The Corps notes that the EO 11988 is implemented for its Regulatory Program through its regulations.²⁶ The Corps has not yet published any floodplain management updates to its regulations and the Associations encourage that the Corps consistent with its existing policy, continues to review the Section 404 applications by applying the traditional framework of "the area subject to the 'base flood' as the relevant 'floodplain' as defined in E.O. 11988 and under 33 CFR 320.4."²⁷

In sum, the Associations' overall recommendations are:

- A. In light of the EO on Energy Independence, the Draft EC should be withdrawn and any future revisions to ER 1165-2-26 should be aligned with the policies set out in this EO.**

- B. In the alternative where EO 13690 and related FFRMS have not been revoked, the Associations recommend that the Corps maintain the traditional framework for all of its Corps programs and remove all references to the FFRMS approaches in the Draft EC and any future rulemaking, guidance or procedures. Any future rulemakings or guidance relating to consideration to natural or nature-based approaches in the development of alternatives for Corps civil works in the floodplain should exclude the Corps' Regulatory Program. Natural or nature-based approaches should be considered where practical on a case-by-case basis and should not preclude structural approaches if appropriate.**

Further in-depth discussion of these comments and specific comments to the Draft EC and Glossary are found below.

²⁴ See discussion below on the 8-step decision making process that the WRC's Flood Management Guidelines provided in 1978 and left unchanged until EO 13690.

²⁵ 33 U.S.C § 1344; 33 U.S.C §§ 401, 403; and 33 U.S.C § 1413.

²⁶ Federal Notice at p. 91,151. The Draft EC cites to 33 CFR § 320.4(l). Draft EC at p. 1.

²⁷ Corps Fact Sheet relating to Section 404 Program.

II. REGULATORY OVERVIEW

The definition of floodplain was first established in 1977 under EO 11988 as that “area subject to a one percent or greater chance of flooding in any given year.”²⁸ EO 11988 states that:

Each agency shall provide leadership and shall take action to reduce the risk of flood loss, to minimize the impact of floods on human safety, health and welfare, and to restore and preserve the natural and beneficial values served by floodplains in carrying out its responsibilities for:

(1) acquiring, managing, and disposing of [f]ederal lands, and facilities;

(2) providing [f]ederally undertaken, financed, or assisted construction and improvements; and

(3) conducting [f]ederal activities and programs affecting land use, including but not limited to water and related land resources planning, regulating, and licensing activities.²⁹

The following year, the requirements of EO 11988 were implemented through the WRC’s Flood Management Guidelines which established an 8-step process to carry out EO 11988’s direction to avoid the direct or indirect support of floodplain development whenever there is a practicable alternative.³⁰ Subsequently, agencies began to implement EO 11988. The FEMA implemented its interim and final regulations creating a similar 8-step process as well as a definition of critical action.³¹ This process includes determining if a proposed action is in the floodplain and evaluating alternatives to constructing in floodplains. The first step³² involving the question of whether a proposed action is in a 1-percent annual chance floodplain (or 0.2-percent annual chance floodplain for critical actions) is determined using the following tools:

- **FIRMs** – Official maps developed by the FEMA showing elevations and boundaries of floodplains and is created for floodplain management and insurance purposes. Through

²⁸ EO 11988. Legal authority is cited as in furtherance of National Flood Insurance Act (“NFIP”) of 1968 (establishes a multi-purpose program to provide flood insurance and minimize damage by floodplains, and guide construction away from floodplains where practicable) and the National Environmental Policy Act (“NEPA”) (requires projects involving proposed federal agency action to consider environmental impacts and evaluate alternatives). Id.

²⁹ Id. This three-part provision defines “action” in 44 CFR § 9.4.

³⁰ 43 Fed. Reg. 6,030 (Feb. 10, 1978).

³¹ 44 Fed. Reg. 76,510 (Dec. 27, 1979); 45 Fed. Reg. 59,520 (Sept. 9, 1980).

³² Remaining steps are generally to notify the public for early review, identify and evaluate practicable alternatives, identify impacts, minimize impacts, re-evaluate the proposed action, issue findings along with a public notice, and implement the proposed action. See footnote 111.

its Risk Map Program, the FEMA consistently releases updated maps in response to change in weather patterns, land development, erosion, and other activities.³³ Flood Map Modernization (“Map Mod”), a multi-year Presidential initiative funded by Congress from 2003-2008, improved and updated the nation’s flood maps and provided 92 percent of the nation’s population with digital Flood Insurance Rate Maps.³⁴

- **Flood Boundary Floodway Map** – Flood map that only shows floodways and flood boundaries.
- **Flood Insurance Study** – Examination, determination, and evaluation of flood hazards.
- **If maps/data are not available, the FEMA must seek detailed information from a list of sources under its regulations, and as last resort, seek services of an engineer.**³⁵

Federal agencies such as the Corps, communities participating in the NFIP program, regulated community, and the public rely on these tools for flood management and insurance purposes; and government staff are also trained in applying this system to a wide array of action including licensing and permitting programs.

Then, stemming from recommendations of the Hurricane Sandy Rebuilding Task Force (“Sandy Task Force”), former President Obama’s Climate Action Plan, and former President Obama’s State, Local, and Tribal Leaders Task Force on Climate Preparedness and Resilience, there was a fundamental change proposed in the designation of floodplains.³⁶ The Sandy Task Force required all major rebuilding efforts in Sandy-affected communities to be elevated to 1-foot above baseline elevation.³⁷ The Climate Action Plan directed agencies to update their flood risk reduction standards for “federally-funded . . . projects” to ensure that “projects funded with taxpayer dollars last as long as intended.”³⁸ The State, Local, and Tribal Leaders Task Force on Climate Preparedness and Resilience recommended federal agencies when taking actions in or around floodplains, to consider the effects of climate change and use best available climate data for siting and designing projects receiving federal funding and to include margins of safety, such as freeboard.³⁹ With these recommendations came the creation of a multi-agency group called the MitFLG chaired by the FEMA which drafted the first FFRMS.⁴⁰ This FFRMS was incorporated into a new EO 13690 as issued by former President Obama in 2015.⁴¹

The EO 13690 offers the following:

³³ See <https://www.fema.gov/risk-mapping-assessment-and-planning-risk-map>. [Last accessed Apr. 25. 2017].

³⁴ See <https://www.fema.gov/map-modernization>. [Last accessed Apr. 25. 2017].

³⁵ 44 CFR § 9.7(c).

³⁶ FEMA’s Proposed Rule at p. 57,406. The former President Obama’s Climate Action Plan, Executive Office of the President. June, 2013.

³⁷ Id.

³⁸ Id.

³⁹ Id.

⁴⁰ Id.

⁴¹ Id. EO 13690.

- Amends EO 11988 and establishes the FFRMS.
- Establishes four approaches for designating a floodplain.
- Requires stakeholder input prior to implementing the FFRMS.
- Requires revising implementing guidelines established by WRC.
- “To the extent permitted by law,” directs agencies to issue/amend regulations and update procedures to comply with the order.⁴²

The FFRMS is described as a “flexible framework to increase resilience against flooding and help preserve the natural values of floodplains.”⁴³ Further, EO 13690 states that “[i]ncorporating this Standard will ensure that agencies expand management from the current base flood level to a higher vertical elevation and corresponding horizontal floodplain to address current and future flood risk and ensure that projects funded with taxpayer dollars last as long as intended.”⁴⁴

The EO 13690 and the Final Revised Guidelines establish floodplains for federally funded projects by using any one of the four approaches:

- **CISA** – the elevation and flood hazard area that result from using a climate-informed science approach that uses best-available, actionable hydrological and hydraulic data and methods that integrate current and future changes in flooding based on climate science.
- **FVA** – the elevation and flood hazard area that result from using the freeboard value reached by adding an additional 2 or 3 feet of vertical elevation (as well as corresponding increase in the horizontal extent of the floodplain).
- **500-year or 0.2-Percent Annual Chance Flood Approach** – the area subject to flooding by the 0.2-percent annual chance flood and using it as a basis for the FFRMS elevation and corresponding horizontal extent.
- **Other** – Elevation and flood hazard area that result from using any other method identified in an update to the FFRMS.⁴⁵

An additional requirement in the 8-step process applies to all actions. This is based on EO 13690 which states, “[w]here possible, an agency shall use natural systems, ecosystem processes, and nature-based approaches when developing alternatives for consideration.”⁴⁶ This would apply to actions such as licensing and permitting programs also.

EO 13690 as reflected in accompanying documents clarifies that the FFRMS will not apply to emergency work essential to save lives and protect property and public health and safety or if it

⁴² EO 13690. Thirty agencies were requested to submit implementation plans to the National Security Council with time frame and process. EO 11988 and EO 13690 Implementing Guidelines Comment Response Document, MitFLG, Oct. 30, 2015, at p. 6 (“Comment Response Document”).

⁴³ EO 13690.

⁴⁴ Id.

⁴⁵ FEMA’s Proposed Rule at p. 57,433.

⁴⁶ EO 13690. This language is added in the Supplementary Policy, Figure 2, Eight-step Decision-making Process for EO 11988, as amended by EO 13690. [Emphasis added.]

is in the interest of national security.⁴⁷ The MitFLG also states that the new FFRMS approaches will not affect insurance premiums or minimum floodplain requirements that communities must adopt in order to participate in NFIP nor will it affect the Clean Water Rule.⁴⁸ Agencies are not precluded from adopting the FFRMS methods for other areas. Agencies would need to simply provide an explanation in their agency-specific procedures if they apply a FFRMS approach to other types of federal action such as permits.⁴⁹

Lastly, unlike the traditional framework where the public has come to expect credible maps for most of the nation, MitFLG has also stated that agencies will not necessarily map all new floodplains determined under the new approaches nor will the new boundaries appear in FIRMs and that such maps if included would only need to extend to the area relevant to the action.⁵⁰

The FEMA's Proposed Rule and Supplementary Policy considered all four FFRMS approaches and the FEMA chose the FVA citing a practical need for standardization, availability of widely available maps/data, minimal staff training needed to determine horizontal extent, and that freeboard requirements have been adopted in 22 states and 596 localities.⁵¹ The FEMA's Proposed Rule rejected the CISA (except for certain critical actions) stating that actionable climate data is not available for all locations and that a lack of standardized methodology in applying the CISA would result in uncertainty/delay.⁵² The FEMA also rejected the 500-year floodplain approach citing limited availability of information for the 0.2-percent annual chance floodplain as well as additional costs associated with producing this information when not available.⁵³

The HUD has proposed rules where it requires structures subject to the HUD's floodplain regulation to be elevated 2-feet above the base flood elevation for non-critical actions and additional 3-feet for critical actions.⁵⁴ The HUD considered all four options and chose the FVA over the CISA and the 0.2 percent flood approach because 1) the CISA cannot be calculated using existing flood maps unless the HUD were to establish criteria for every community regarding the application of particular climate and greenhouse gas scenarios and associated impacts; 2) the CISA requires expertise that may not be available to all communities (i.e. "not just historical analysis but a greater anticipation of trends and future conditions;") 3) it will not be cost-effective to establish a CISA; and 4) many states and communities already have success

⁴⁷ EO 13690.

⁴⁸ Comment Response Document at pp. 5-6.

⁴⁹ Comment Response Document at p. 4.

⁵⁰ Id. at p. 3.

⁵¹ FEMA's Proposed Rule at pp. 57,411-57,412.

⁵² Id.

⁵³ Id. at p. 57,412.

⁵⁴ 81 Fed. Reg. 74,967 (Oct. 28, 2016).

applying a higher-elevation approach to floodplains and due to the familiarity that communities have with higher elevation standards, the FVA is seen as a practical approach.”⁵⁵

The Corps has also stated that its policy is to continue to review Section 404 applications by applying the area subject to the base flood elevation under the traditional framework.⁵⁶ No steps have been taken to change the floodplain requirements for the Regulatory Program under its applicable regulations. Otherwise, the Corps has established a Product Delivery Team (“PDT”) with members from areas across the agency to review and draft revisions to existing guidance.⁵⁷ The PDT developed this Draft EC which would rescind ER 1165-2-26 to “provide overarching guidance to all USACE Civil Works mission areas”⁵⁸ and does not cover its Regulatory Program which the draft EC states is covered under 33 CFR Section 320.4(l). The Corps notes that the guidance does not provide extensive detail about how the requirements will be implemented in specific program areas and that it expects to phase in full implementation of the new requirements as additional program-specific guidance is revised.⁵⁹ The Draft EC is proposed to expire two years from issuance, which will provide the Corps time to evaluate the guidance provided, consider initial implementation experience to identify any necessary clarifications or changes and incorporate any changes.⁶⁰ After two years, the Draft EC is proposed to be revised and reissued or converted to an ER which does not expire and is more permanent agency guidance.⁶¹

The Draft EC applies to Corps actions that are in three categories of federal action as defined in EO 13690, and, the Corps creates a bifurcated system of determining the vertical extent of the floodplain elevation and the corresponding horizontal floodplain.⁶² That is, it includes programs that will be subject to the traditional framework and those that will be subject to the FFRMS approaches. Similar to the FEMA’s Proposed Rule and guidelines, exemptions are also provided for emergency flood-related actions (but will comply to the extent practicable) and for actions in the interest of national security.⁶³ Other areas not applying to the Draft EC include routine operations and maintenance activities that do not impact or change the floodplain and any Corps action initiated before the date of issuance of this EC.⁶⁴

⁵⁵ Id. at pp. 74,967, pp. 74,970-74,971.

⁵⁶ Corps Fact Sheet Relating to Section 404 Program.

⁵⁷ Federal Notice at p. 91,151.

⁵⁸ Id.

⁵⁹ Id., Future USACE Implementation of EO 11988, Corps (“Corps Fact Sheet relating to EO 11988”). http://www.iwr.usace.army.mil/Portals/70/docs/frmp/eo11988/EO_11988_USACE_Implementation_12_12_16.pdf. [Last accessed Apr. 25, 2017].

⁶⁰ Federal Notice at p. 91, 151.

⁶¹ Id.

⁶² Draft EC at pp. 4-6.

⁶³ Id.

⁶⁴ Id.

For other Corps actions subject to the FFRMS, the Corps “will utilize the CISA approach, unless compelling justification for using one of the other approaches is developed and document[ed].”⁶⁵ The Corps includes examples of applicable actions such as 1) requests for permission pursuant to Section 408 to alter an existing and operational project that was previously analyzing using the FFRMS floodplain; and 2) Section 408 projects that directly impacting Corps actions as outlined in Sections 6a(1)(a) and 6a(1)(b) (relating to projects that result in recommendations to Congress for authorization of projects or modifications to previously authorized projects; or projects that result in recommendations for the implementation of projects that do not require additional congressional authorization or projects that are directly authorized by Congress without the benefit of a Corps investigation).⁶⁶ Note that any other Section 408 projects outside of Sections 6a(1)(c) and 6a(1)(d) may fall under the traditional framework and the Corps states in its fact sheet that additional guidance relating to Section 408 will be clarified in future guidance.⁶⁷

The Corps does appear to limit the use of the CISA by stating that while both horizontal and vertical extents of floodplains will be estimated, the vertical extent will not be used as a design standard or to provide a minimum vertical elevation for use in planning and design of Corps projects that involve horizontal infrastructure such as riverine, harbor, and coastal facilities, seawalls, jetties, revetments, engineered beaches and dunes, levees, and interior drainage facilities.⁶⁸ The Corps states that it will use vertical flood elevation in evaluating and formulating alternatives and in selecting a recommended course of action based on their impacts.⁶⁹

The Corps also includes requirements to consider natural and nature-based approaches when considering alternatives which is an additional requirement in Step 3 in the 8-step process and states that it will provide additional guidance on this subject.⁷⁰ The Corps also includes the consideration of nature-based approaches to Step 7 which states that if no practicable alternative exists to locating an action in a floodplain, additional notification should be provided on what, if anything, was done to minimize impacts and restore and preserve floodplain values.⁷¹ The Corps also revises its section on restoring and preserving floodplain values to now include using natural and nature-based features.⁷²

Now in 2017, the EO on Energy Independence has explicitly rescinded EO 13653 (Preparing the United States for the impacts of Climate Change) which, amongst other things, established the

⁶⁵ Draft EC at p. 9.

⁶⁶ Section 14 of the Rivers and Harbors Act of 1899 as codified in 33 U.S.C § 408 (“Section 408”) (requires approval from the Corps for modifying, altering, or occupy any existing Corps constructed public works projects). Id. at p. 5.

⁶⁷ Id. Corps Fact Sheet relating to EO 11988.

⁶⁸ Id. at pp. 6-7.

⁶⁹ Id. at p. 7.

⁷⁰ Id.

⁷¹ Id. at p. 11.

⁷² Id. at p. 12.

State, Local, and Tribal Leaders Task Force on Climate Preparedness and Resilience.⁷³ This same EO on Energy Independence also rescinded the former President Obama’s Climate Action Plan.⁷⁴ As discussed above, recommendations stemming from EO 13653 and the Climate Action Plan formed the basis for the FFRMS. The EO on Energy Independence specifically requires heads of all agencies to identify agency actions related to or arising from these Presidential actions (i.e. rescinded EOs and reports) and requires each agency to, “as soon as practicable, suspend, revise, or rescind, or publish for notice and comment proposed rules suspending, revising, or rescinding any such actions, as appropriate and consistent with law and with the policies set forth” in the EO.⁷⁵ Agency actions are defined as “all existing regulations, orders, guidance, documents, policies, and any other similar agency actions” that “potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources.”⁷⁶

III. CENTRAL COMMENT

Given the explicit directives in the EO on Energy Independence, the Corps should remove this Draft EC from consideration, and any future revisions to ER 1165-2-26 should be aligned with the policies set out in this EO.

The EO on Energy Independence is very clear in requiring heads of all agencies to identify existing agency actions related to or arising from the Presidential Actions that rescind certain energy and climate-related EOs and certain guidance and reports; and then, “as soon as practicable, suspend, revise, or rescind . . .” any such actions.⁷⁷ These explicitly include EO 13653 (Preparing the United States for the Impacts of Climate Change) and the former President Obama’s Climate Action Plan.⁷⁸ Both of these were instrumental in laying out recommendations for new floodplain standards which became the foundation for the FFRMS. The former President Obama’s Climate Action Plan, for example, mandated that “federal agencies will update their flood-risk reduction standards for federally funded projects to reflect a consistent approach that accounts for sea-level rise and other factors affecting flood risks.”⁷⁹ Since the definition of “agency actions” in the EO is broad, and this provision is triggered for any agency action “related to” or “arising from” these listed Presidential actions, reports, and guidance, these provisions of the EO apply to all actions related to the FFRMS, including but not limited to this Draft EC.

⁷³ EO on Energy Independence, § 3(a)(i).

⁷⁴ Id. at § 3(b)(i).

⁷⁵ Id. at § 3(d).

⁷⁶ Id. at § 2(a).

⁷⁷ Id. at § 3(d).

⁷⁸ Id. at § 3(a) and (b).

⁷⁹ The former President Obama’s Climate Action Plan at p. 15.

IV. ADDITIONAL COMMENTS

The Associations applaud President Trump's EO on Energy Independence and believe that given the provisions set out in this EO, agencies are precluded from taking any further action relating to implementing FFRMS. As such, any further discussion on this Draft EC is moot. Yet, EO 13690 and associated guidance have not been explicitly revoked as of the date of this letter. Thus, the Associations provide the following comments.

A. This Draft EC has potentially far-reaching regulatory and economic implications that is little understood or defined (e.g. reach of the FFRMS approaches into other areas).

While this particular Draft EC applies to certain Corps civil works projects and the Regulatory Program is not included, there is a potential for a plethora of "choose-your-own" floodplain definitions left to the discretion of individual governmental agencies as each of these jurisdictional entities attempt to apply the new risk-based approaches (and by extension, to many state and local governments). This is already evident in the fact that the HUD and the FEMA have chosen the FVA in its proposed rules while the Corps, without any additional justification, has chosen the problematic CISA. As more agencies implement the FFRMS including the Corps under its Regulatory Program, this fragmented path will only worsen. Certain programs such as those under the NEPA require multi-agency coordination and there is uncertainty in terms of which floodplain approach and process would apply. The sheer breadth of the ripple effect caused by this Draft EC as well as proposed rules by the FEMA and the HUD counsels strongly in favor of maintaining the traditional framework until the proposed approaches have been fully vetted and subject to rigorous cost-benefit analysis.

B. At a fundamental level, EO 13690, FFRMS, the Final Revised Guidelines, and now the draft EC change the overall perception of floodplain to risk-based ever-evolving designations instead of firm standards based on expected frequency.

With a new FFRMS model, there is a structural shift in the floodplain paradigm that has been carefully developed by the FEMA and has become an integral part of the common parlance. This change undermines the FEMA's well-established and robust existing mapping tools as discussed above. Clearly, there is already consideration to revisions to the scope of the FFRMS floodplains to other areas, with Corps indicating that it will be evaluating and identifying any necessary clarifications or changes at the end of two years.⁸⁰ Moreover, this erratic system of designating floodplains -- one for certain federally funded civil projects, another for the Corps' Regulatory Program -- is likely to lead to confusion in the eyes of its users as well as uncertainty leading to significant effect on project compliance, engineering design, construction and operation costs. This confusion would also trickle-down to state and local governments including potentially non-federal sponsors under Section 408. Adding unwarranted ambiguity to the existing floodplain framework could also expose Corps and other agencies to more judicial challenges to proposed federal actions similar to challenges to NEPA analyses which are at times arbitrarily used as a tool to delay and stop certain projects.

⁸⁰ Federal Notice at p. 91,151.

C. Corps' adopting any of the FFRMS into its floodplain decision making process is imprudent at this time and the traditional framework should remain.

The draft EC provides that while CISA is its primary choice, it will consider one of the approaches if “compelling justification for using one of the other approaches is developed and document[ed].”⁸¹ The Corps does not provide an explanation of what it means by “compelling justification.” Moreover, there are fundamental issues with each of the remaining approaches.

a) *FVA*. This approach will result in a vertical elevation of 2-feet or 3-feet as well as a corresponding horizontal expansion of the floodplain. The FEMA chose this approach but as discussed in the Associations' comment letter to the FEMA on its Proposed Rule, the scope of the floodplain expansion is not known to the FEMA because of limitations with data collection, uncertainty with modeling, and variability in local conditions. The FEMA acknowledges that “[b]ecause of the varied topography and hydrography of the United States, it is very difficult to provide an estimate of how much the floodplain would expand as a result of adding freeboard values nationwide.”⁸² With elevation requirements for the construction of certain federally funded structures and facilities, the FEMA also raises concern with compliance with the American Disabilities Act and other similar statutes which could increase costs dramatically.⁸³ In addition, a 2-foot or 3-foot increase in freeboard does not consider local conditions including varying terrain, flow direction or drainage patterns.

The FEMA also mistakenly believes that there will be minimal effort to determine the horizontal extent of a floodplain because of widely available data and that freeboard requirements have already been adopted in many states and localities. However, establishing ground elevation is not as simple as consulting the FEMA maps for baseline elevation. The FEMA states it may use available topographic information from the USGS and also rely on information submitted by an applicant on part of their project application.⁸⁴ It is unclear the information that the Corps would use if it applied this approach.

In addition, the states and local entities that have adopted increased freeboard requirements still continue to confine those requirements within 100-year floodplain boundaries. Yet, depending on the area of the country, the FVA contemplates an expanded flood zone beyond the existing 100-year floodplain definition. This is an entirely new and uncharted dimension and it is unclear if the Corps has contemplated the impacts and costs associated with this choice or the type of compelling justification it would require to meet this FVA.

⁸¹ Draft EC at p. 9.

⁸² Regulatory Evaluation at p. 38.

⁸³ FEMA's Proposed Rule at p. 57,412.

⁸⁴ *Id.* at p. 57,414. See also discussion of the 0.2 percent approach in the HUD's Proposed Rule.

b) *The 0.2-percent annual chance flood chance (known as 500-year flood elevation).* As discussed in the FEMA’s Proposed Rule, this approach is also problematic because only 18 percent of mapped flood zones have detailed floodplain boundaries of the 0.2-percent annual chance floodplain.⁸⁵

c) *The elevated and flood hazard area that results from using any other method identified in an update to the FFRMS.* The FFRMS is to be reviewed every year and revised at least once every 5 years.⁸⁶ The FFRMS is not subject to APA notice and comments requirements and given its crucial role in defining a floodplain method, any standard that is revised under the FFRMS may be subject to notice and comment under the APA.

D. Given considerable challenges and modeling uncertainties, the CISA should not be considered in the Draft EC.

There is a lack of consistent data and modeling uncertainty with the CISA that even the FEMA, the expert agency on floodplain issues, acknowledges this approach and rejects in its Proposed Rule.⁸⁷ As discussed in the FEMA’s proposed rule, there is a lack of availability of actionable climate data for all locations, especially for inland riverine floodplains, and it would be difficult to implement a CISA using standardized, predictable, flexible, and cost-effective methodology.⁸⁸

The Final Revised Guidelines also qualify the use of CISA stating that while it prefers the CISA, “[f]ederal departments and agencies should use this approach when data to support such an analysis are available.”⁸⁹ Appendix H also states that, “agencies are responsible for identifying the information used as the basis of their implementation.”⁹⁰ Here, other than the two references mentioned in the Draft EC -- Appendix H of the Final Revised Guidelines and Engineering Regulation 1100-2-8162, the Corps has not provided any additional documentation to indicate that there is data to support the CISA or to provide the basis of their decision as pertaining to this Draft EC.⁹¹

Even MitFLG acknowledges that, “[n]o approach analogous to the scenario approach of Parris et al. (2012) [relating to global sea-level rise scenarios] has yet been developed to account for uncertainties due to climate change with respect to projected future precipitation and associated

⁸⁵ *Id.* at p. 57,404.

⁸⁶ EO 13690.

⁸⁷ In very limited area of critical actions, the FEMA’s Supplementary Policy encourages CISA for critical actions but again only if actionable science is available and if the elevation under CISA is higher than FVA. Supplementary Policy at p. 2.

⁸⁸ FEMA’s Proposed Rule at pp. 57,411-57,412.

⁸⁹ Final Revised Guidelines, Appendix G (Note this appendix contains the FFRMS) at p. 51.

⁹⁰ Final Revised Guidelines, Appendix H at p. 5.

⁹¹ Final Revised Guidelines, Appendix H; Incorporating Sea Level Change in Civil Works Programs, ER 1100-2-8162 (Dec. 31, 2013) (“ER 1100-2-8162”).

riverine flooding.⁹² Thus, the Final Revised Guidelines state that, “[a]s a result of the limitations of available and actionable science, agencies should account for projected changes in riverine conditions due to future changes in climate and land use by applying the CISA in a manner appropriate to policies, practices, criticality, and consequences.”⁹³ This self-acknowledgment of the limitations of actionable and available science followed by a very open-ended recommendation deferring to federal agencies is not further addressed by the Corps in the Draft EC as to how the Corps will apply CISA to these conditions where there is so much uncertainty in the science and modeling. Note that the second referenced document, ER 1100-2-8162 as issued in 2013, is also limited to consideration of sea level rise in coastal areas and does not contemplate inland riverine conditions.”⁹⁴

The Associations recognize that the Corps attempts to narrow the applicability of vertical elevation under the CISA to not create a design standard or to provide a minimum vertical elevation for use in the planning and design of Corps projects.⁹⁵ However, the Corps is creating such a complicated system of what is covered and what is not that it is almost like the Corps is trying to reshape the edges so that it can get a square peg into a round hole. The traditional framework with its bright lines that already considers varying meteorological, land development, erosion and other causes is a far more straight-forward approach and achieves a similar objective toward effective flood management.

E. No comprehensive cost-benefit analyses of EO 13690 and the FFRMS have been released by the Corps that evaluates anticipated effects on flood resilience and floodplains and the distribution across stakeholders of costs and benefits in the near-term and long-term.

Without any supporting documentation, the Corps creates a requirement to use the CISA in most Corps civil works projects with certain key exceptions and expects to issue additional supporting policies and procedures after-the-fact. The CISA is a dramatic shift from the traditional framework that has been in place since the issuance of the EO 11988 in 1977. As is, EO 13690 and the FFRMS was released without any cost-benefits studies. Even the FEMA struggles with providing a reasonable cost-benefit analysis and includes, by its own admission, a Regulatory Evaluation that uses data with limited scope.⁹⁶ The FEMA estimates that for the 10-year period after the rule goes into effect the benefits would justify the costs.⁹⁷ Yet, the benefits are based on qualitative assumptions and no monetized benefits are provided.⁹⁸

⁹² Final Revised Guideline, Appendix H at p. 14. (parentheses are a part of the quote).

⁹³ Id. at p. 16.

⁹⁴ ER 1100-2-8162.

⁹⁵ Draft EC at p. 7.

⁹⁶ 81 Fed. Reg. at p. 64,404.

⁹⁷ Regulatory Evaluation, Docket No. 2015-0006 relating to the FEMA’s Proposed Rule, Aug. 22, 2016, at p. 2.

⁹⁸ Id. at pp. 82-88. See API et al.’s Comments on the FEMA’s Proposed Rule.

The Corps is putting the cart before the horse by attempting to fit a questionable CISA that has not been appropriately vetted into its implementing guidance. As stated in the Regulatory Evaluation, relating to impacts, the Proposed Rule allows the FEMA the option of using the CISA for certain critical actions but states that the “impact [is] not currently quantifiable.”⁹⁹ The FEMA states that “limited actionable data exists for this approach making it difficult to estimate the cost for CISA until it becomes technologically feasible.”¹⁰⁰ It is unacceptable to require an approach in the Draft EC where the impacts are unknown and the effect of this approach on states and local governments and others has not been fully considered.

F. Consideration of natural and nature-base approaches when developing alternatives for a federal action in the floodplain should not apply to the Regulatory Program in any future rulemaking or guidance and instead should be applied on a case-by-case basis where possible.

A new requirement that amend EO 11988 states that agencies, “where possible,” shall use nature systems, ecosystem processes, and nature-based approaches are to be used when developing alternatives for a federal action in the floodplain. The Draft EC adopts this language for projects covered under this guidance and this Draft EC does not apply to the Regulatory Program. This non-compulsory language in EO 13690, applying to all federal action including federal activities and programs affecting land use, including but not limited to water and related land resources planning, regulating and licensing activities, should not be extended to the Corps’ Regulatory Program in future rulemakings or guidance. The Associations ask that the Corps provide for the use of these approaches on a case-by-case basis where practicable and not preclude the use of structural approaches for flood risk management where appropriate. Specific comments are provided in the section below.

G. Corps’ Draft EC is not required to follow the revisions in EO 13690 and the FFRMS unequivocally but should ensure that the APA and other applicable requirements are met.

It is important to understand that EO 13690 only requires “[t]o the extent permitted by law,” each agency shall . . . issue or amend existing regulations and procedures to comply with this order, and update those regulations and procedures as warranted.”¹⁰¹ In addition, it should be noted that EO 11988 as amended does not create a mechanism for enforcing the terms of the order except that the Water Resources Council is required to “periodically evaluate agency procedures and their effectiveness” which the FEMA can demonstrate through its robust flood management program.¹⁰² Moreover, the flexible FFRMS does not have the force of law and neither do the Final Revised Guidelines which are simply advisory.¹⁰³ In essence, the Corps is not required to follow EO 11988, EO 13690 and FFRMS requirements blindly, but it is legally

⁹⁹ Id. at p. 22 (Table 5 – Summary of the FEMA Changes).

¹⁰⁰ Id.

¹⁰¹ EO 13690, § 3(c). (Emphasis added.)

¹⁰² EO 11988, § 5.

¹⁰³ Final Revised Guidelines at p. 3.

required to follow the APA and other applicable requirements. Introducing burdensome requirements under the guise of a guidance thwarts the APA requirements and appears to have the “practical effect” of adding obligations, burdens, and restrictions without the opportunity of an APA rule subject to judicial review.¹⁰⁴ Choosing the CISA may be viewed as an arbitrary decision making when no extensive cost-benefit analysis has been conducted by the Corps under APA requirements.

V. SPECIFIC COMMENTS ON THE DRAFT EC AND GLOSSARY¹⁰⁵

A. Provisions in the Draft EC related to the EO 13690 or the FFRMS should be removed; and applicability to Section 408 programs should be more clearly laid out.

a. Purpose, Section 1, Lines 13-29 (and other applicable sections). For reasons discussed above, the Associations recommend that the Corps refrain from implementing the EO 13690 and applying the FFRMS to any of the Corps programs. Accordingly, additional policies and program guidance related to FFRMS as specified under Draft EC, Section 1(b) are also not needed. Conforming changes throughout the document should be made deleting all references to EO 13690 and FFRMS, and sections should be rewritten to reflect the traditional framework. This position should also continue to be reflected in any future rulemakings regarding floodplain management affecting Corps’ Regulatory Program.

b. Use of this EC, Sections 1-2, Lines 165-204. This comment would be moot if references to the FFRMS are removed as requested. Otherwise, the language pertaining to Section 408 applicability is ambiguous and does not adequately provide which projects would be covered under the CISA and which projects would be covered under the traditional framework. Sections 6a(1)(c) and 6a(1)(d) of the Draft EC when read together with Section 6a(2)(c) do not provide information on the extent that the CISA would affect non-federal sponsors and consequently affected parties that make the initial request to alter a project.

c. General Policy, Section 7(c), p. 7, Lines 265-272. The Corps adds language that amends EO 11988 pertaining to natural and nature-based approaches and further modifies it by stating that where possible, the Corps will consider these approaches “alone and in combination with other structural and non-structural measures when identifying alternatives for minimizing impacts.”¹⁰⁶ The Corps also provides that additional language will be provided in the future.¹⁰⁷ The Associations agree with the additional language clarifying that structural measures are not precluded. However, the language “alone and in combination with” is ambiguous. There may be scenarios where nature-based approaches alone or in combination are not possible and only

¹⁰⁴ See footnote 21 above.

¹⁰⁵ This comments are notwithstanding the Associations’ position that the Draft EC should be withdrawn and revised per the EO on Energy Independence.

¹⁰⁶ Draft EC at p. 9.

¹⁰⁷ Id.

structural measures are available. This possibility needs to be addressed in the revised language.

d. General Procedures, Section 7(c), pp. 8-11, Lines 296-440. Per our overall position, ER 1165-2-26 already includes a succinct summary of the 8-step process from EO 11988 in Section 8 which the Associations recommend mirroring here.

e. Minimize, Section 10, p. 12, Lines 455-463. The section remains mostly unchanged from ER 1165-2-26. One key change is that it states where there is no practicable alternative to be taken, steps “must” be taken instead of “should” as previously stated. The Associations recommend the language be restored to “should.”

f. Restore and Preserve, Section 11, p. 12, Lines 477-484. The 8-step decision making process that has long been in place determines whether a proposed action would be located within or affect a floodplain, and if so, whether and how to continue with or modify the proposed action.¹⁰⁸ EO 13690 amended this process by stating, “[w]here possible, use natural systems, ecosystem processes and nature-based approaches in developments of alternatives for all actions to which EO 11988 applies.”¹⁰⁹ The specific reference to “developments of alternatives” appears to refer to a specific step in the decision making process relating to considering alternatives. For example, the FEMA proposes to add the requirement to use natural systems, ecosystem processes, and nature-based approaches in the development of alternatives for Federal actions in the floodplain as part of its step 3 as found in 44 CFR Section 9.9.¹¹⁰ The Corps, however, adds the nature-based language to a separate step concerning minimizing impacts to floodplains and restoring and preserving the natural and beneficial floodplain values. Section 11 of the Restore and Preserve Section in the Draft EC now includes 2 new provisions relating to using “natural and nature-based features” and “natural features” to support engineering functions. This appears to be an expansion of EO 13690 language relating to consideration of alternatives, is contrary to the FEMA’s proposed rule, and also goes beyond the equivalent Section 11 in ER 1165-2-26. These provisions should be removed and the language should be restored to ER 1165-2-26 which provides broad examples of actions to take for restoring and preserving floodplains and does not preclude the use of natural and nature-based approaches.¹¹¹

g. Real Estate Activities, Section 11, pp. 12-13, Lines 489-497. This section applies to property that is in the floodplains and is proposed for outgrant or disposal to non-federal public or private parties. The Corps is required to reference floodplain restrictions and withhold properties if the proposed use is incompatible with good

¹⁰⁸ See EO 11988, 44 CFR § 9.6 (describes the 8-step decision making process). The Corps has outlined the 8-step process in ER 1165-2-27, § 8.

¹⁰⁹ EO 13690, § 2(c) amending EO 11988 § 2(a)(2).

¹¹⁰ FEMA’s Proposed Rule at p. 57,418. See also Draft EC, § 7(c).

¹¹¹ ER 1165-2-26, § 11.

floodplain management. This provision seemed clear under the traditional framework; however, there is tremendous scope for floodplain expansion and variability under the FFRMS approaches, and thus great uncertainty in the application of this provision consistently across the board. As discussed previously, applying the traditional framework throughout all Corps projects will avoid potential issues raised under this proposed section.

h. Public Notification Requirements, Section 14, pp. 13-14, Lines 534-544. Since 1977, EO 11988 has included specific public notice requirements where no practical alternative to locating an action in the floodplain exists. This was unchanged by EO 13690. Yet, the Corps chooses now to add a new section to the Draft EC. The Corps goes beyond mirroring the language in EO 11988 as the FEMA rules in 44 CFR Section 9.2 but there are additional obligations added to the base requirement to include a description of significant facts. These include a summary of public comments received as well as any tradeoffs that were made. In addition, EO 11988 includes a statement indicating whether the action conforms to applicable state and local floodplain protection standards and the Corps adds the FFRMS to this list. The Associations recommend leaving the language as broadly stated in EO 11988.

i. Internal reporting, Section 15, pp. 14-15, lines 579-587. This is a new section that states that “[i]nternal reporting on compliance efforts will be required” “to inform necessary revisions to this EC” and implementation experience and lessons learnt will be collected every six months.¹¹² More detailed supplementary guidance on information to be collected will be issued by the Corps at a later date.¹¹³ The Corps should be transparent as to its long-term objective with this mandatory internal reporting requirement on compliance efforts and the extent of the impact of this Draft EC if such extensive reporting is to be required. Also, given the Associations’ recommendation to apply the traditional framework in lieu of the FFRMS, and if heeded, this section may not be necessary.

B. The definitions in Attachment 1 – Glossary should not reference EO 13690 or FFRMS; and definitions, where necessary, should be clearly drafted to provide clarification to terms used in the Draft EC.

a. 1-percent-annual chance flood and 1-percent-annual chance floodplain, p. 16, Lines 599-608. The FEMA and the NFIP are the primary authorities on floodplains and rather than having a multitude of varying definitions, these definitions should mirror definitions by the FEMA. There is no mention to a reference to the North Atlantic Coast Comprehensive Study (“NACCS”) in the FEMA definition and the Associations ask that the last sentence of these two definitions be deleted (“This is equivalent to the 1 percent flood in the North Atlantic Coast Comprehensive Study (NACCS.” P. 16, lines 601-603). The prior definitions in ER 1165-2-26 do not include this last sentence either and instead references the National Flood Insurance Program.

¹¹² Draft EC at pp. 14-15.

¹¹³ Id.

- b. **Base Flood and Base Floodplain, p. 16, Lines 626-631.** These are overlapping definitions with the 1-percent annual chance definitions above and again should mirror the FEMA definitions which combine them into one definition.
- c. **Direct Support, p. 17, Lines 650-652.** This is a new definition and references to a term used in EO 11988 from 1977. That is, the FEMA must identify if the action has impacts in the floodplain or directly or indirectly supports floodplain development that has additional impacts in the floodplain. It is not clear why the Corps needs to define this particular term at this time. No such definition is included in the FEMA's Proposed Rule. The open-ended language could cause confusion since a definition is not provided for indirect support.
- d. **Emergency Actions p. 17, Lines 654-672.** The Corps creates its own confusing definition that does not reflect the EO 13690 that it is trying to implement. The definition should be rewritten to state "emergency work essential to save lives and protect property and public health and safety, performed pursuant to Sections 403 and 502 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1988 (42 U.S.C. 5170b and 5192)."
- e. **Critical Action, p. 17, Lines 647-648.** This definition for the most part in the Draft EC is the same as ER 1165-2-26 except a deleted sentence that states, "The critical action floodplain is defined as the 100-year floodplain (0.2 percent chance floodplain)."¹¹⁴ The FFRMS states that federal departments and agencies will be responsible for determining whether a federal action constitutes a critical action; and yet, the definition does not reference the applicable floodplain approach as is provided in the current rule. The Corps should clarify the floodplain approach that will apply to critical actions. That is, the 500-year floodplain should be kept as a status quo under the traditional framework.
- f. **FFRMS and FFRMS Floodplain, pp. 17-18, Lines 674-702.** For reasons discussed above, these definitions must be deleted and the Corps should adhere to the traditional framework. In addition, the FFRMS is expected to be reviewed annually and revised at least once every 5 years outside of the APA notice and comment requirements.¹¹⁵ The FFRMS is provided as a "flexible framework."¹¹⁶ Incorporating the FFRMS by reference into the Draft EC, without any further opportunity for notice and comment would be inappropriate.
- g. **Floodplain, p. 18, Lines 705-709.** The last sentence specifying that the floodplain will be based on the type of action and whether the action is a critical action is not needed and should be deleted. There are more specific definitions that explain the applicability requirements such as 1-percent-annual chance floodplain and 0.2-percent-annual chance floodplain and are used in the Draft EC.
- h. **Freeboard, p. 18, Lines 711-717.** The three times this word appears is in the context of Freeboard Value Approach definitions. The term is a technical term

¹¹⁴ ER 1165-2-26 at p. 2.

¹¹⁵ FEMA's Proposed Rule at p. 57,411.

¹¹⁶ Id. at p. 57,407; EO 13690.

and is not defined specifically in the FEMA's Proposed Rule either. It should be deleted as unnecessary and also as part of other recommendations to generally delete all references to FFRMS approaches.

- i. Minimize, p. 18, Lines 719-724.** Corps adds clarifying language that given the context of the definition, there is an implicit acceptance of practical limitations. The Associations agree with this clarification. Note that the Associations also agree with clarifying language under "practicable" (p. 19, Lines 763-767) and providing examples of factors that would determine what is practicable (i.e. legality, engineering etc.).
- j. Nature-based approaches or features, p. 19, Lines 752-761.** This is a new subset of a requirement in the EO 13690 that as part of the 8-step process requires, where possible, natural systems, ecosystem processes, and nature-based approach, as alternatives, when considering development in a floodplain for any federal action. This Corps definition adds "or features" but this whole definitional phrase only appears partially in the text. As discussed above, there should be flexibility in considering alternatives on a case-by-case basis and consistent with our recommendation to the FEMA's Proposed Rule, the Associations request that this definition not be included here.
- k. Natural processes and systems, p. 19, Lines 744-750.** This specific term is not used outside of the definition. There is one reference to natural processes in the restore section. This is a new definition that is unnecessary and should be deleted.

VI. SUMMARY

Improving the resilience of Corps' civil works projects against catastrophic flood events is an important issue that the Corps has been addressing under its existing processes and procedures. Moreover, there is already a robust structure in place that relies on ongoing work done by the FEMA to identify flood hazards, assess flood risks, coordinate with stakeholders, and continuously provide updated flood maps to reflect the latest weather patterns, land development, and erosions conditions. These measures provide effective basis for flood management resulting in more resilient communities.

The Associations appreciate the extension of the comment period and the opportunity to submit comment on this important issue. The Associations also recognize that the EO on Energy Independence, as issued after the Draft EC was published for comment, provides clear policy directives on agency actions with a focus on "avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation," and that it rescinds certain climate-related presidential and regulatory action"¹¹⁷ applicable to this draft EC. As such, the Association requests that the Draft EC be rescinded or revised under policies as set out in the EO on Energy Independence. In the alternative, the Associations also provide comprehensive additional comments for your consideration.

We look forward to working with you on this important issue.

¹¹⁷ EO on Energy Independence, § 1 and § 3.

Sincerely,



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